

**Letter of Findings Number: 04-20120149**  
**Sales/Use Tax**  
**For Tax Years 2008 - 2010**

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**ISSUE**

**I. Sales/Use Tax—Best Information Available.**

**Authority:** IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; [45 IAC 15-3-5](#).

Taxpayer protests the Department's proposed assessments of sales and use tax.

**II. Tax Administration—Penalty and Interest.**

**Authority:** IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty and interest.

**STATEMENT OF FACTS**

Taxpayer is a sole proprietor of a business that does vehicle work. Taxpayer was audited by the Indiana Department of Revenue ("Department"). Following the audit, Taxpayer filed a protest. A telephone hearing was held, and this Letter of Findings results. Further facts will be supplied as required below.

**I. Sales/Use Tax—Best Information Available.**

**DISCUSSION**

At the outset, the Department notes that the burden of proving a proposed assessment is wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c). Regarding sales and use tax, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-2-1; IC § 6-2.5-3-2.

The Department's Audit Report states that the Department has made "[n]umerous attempts" to "conduct a compliance audit" of Taxpayer. The Audit Report states:

The taxpayer has been informed via letters and telephone calls on many occasions of the audit. The auditor had scheduled the start of the audit for [] and confirmed with taxpayer, auditor arrived at location and taxpayer was not there. The taxpayer had left a message just prior to starting the audit and stated that he did not have the records and needed more time. Department had granted taxpayer more time to get records and returns up to date. A subpoena was issued in January 2011 for the taxpayer's records and the taxpayer has remained unresponsive.

Since Taxpayer did not make the needed information available, the Department used "an alternative audit technique" to "determine sales for calendar years 2008-2010[.]" IC § 6-8.1-5-1 states in pertinent part:

(b) If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail. (Emphasis added).

[45 IAC 15-3-5](#) also states in part:

(a) Investigations. The department, or its authorized agents, may examine the books, records, papers, or other data bearing on the correctness of returns, including those pertinent records of third parties handling funds for the credit of, or acting as agent for, any person subject to a listed tax. This includes, but is not limited to, records maintained by banks, savings and loan associations, and credit unions.

(b) Subpoena Power.

(1) The department has the power to issue subpoenas compelling the attendance of any person called upon to testify in any matter before the department. The department also has the power to compel the production of books and records.

Thus the Department had the right to examine Taxpayer's records, and in the event of Taxpayer's failure to provide the records to issue a proposed assessment based upon "the best information available" (i.e., "B.I.A."). The Department did this, and Taxpayer subsequently protested the B.I.A. proposed assessment.

At the hearing, Taxpayer argued that he is the only employee and that it is a small operation. Taxpayer argued that the business was more like a part-time business than a full-time one. In his protest letter, Taxpayer states:

I am a one man operation that's lucky to get one car a day in to work on, [and] rely on scraping metals to make an income such as junk cars[,] old mufflers[,] pipes[,] and] rotors. I have enclosed a copy of my yearly earnings since 1979 when I began working to 2004 which is the most current one I could find [....]

The copy of his "yearly earnings" that Taxpayer refers to does not have his name or identification on it, nor is it for the years at issue. Also, it appears to be a federal document relating to taxed Social Security earnings. It is not applicable to the protested issue at hand.

Taxpayer did not cooperate with the audit at the time of the audit, which resulted in proposed B.I.A. assessments. Taxpayer's protest is, in essence, a protest of the Department's B.I.A. methodology. Taxpayer, after the hearing, provided the Department with copies of numerous repair orders/invoices. The Department's Audit Division is requested to review the documentation that Taxpayer has now provided, and to the extent that it is an accurate representation of Taxpayer's sales and use tax liability for the years at issue, make any appropriate adjustments to the proposed assessments.

#### **FINDING**

Taxpayer's protest is sustained subject to Audit review of the documentation Taxpayer has provided. The Audit Division is requested to review Taxpayer's documentation and to the extent applicable make any appropriate adjustments to the proposed assessments based upon that documentation.

### **II. Tax Administration—Penalty and Interest.**

#### **DISCUSSION**

Taxpayer was also assessed penalty and interest. It is not clear from Taxpayer's protest whether or not both are being protested, but for the purposes of clarity the Department will assume that they are being protested. Interest, per IC § 6-8.1-10-1(e), cannot be waived. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has not shown reasonable cause. Taxpayer did not cooperate with the Audit, despite "[n]umerous attempts" and Taxpayer was "unresponsive" to the Department's subpoena of documentation. Taxpayer's protest of the penalty and interest is denied.

#### **FINDING**

Taxpayer's protest of the penalty and interest is denied.

#### **SUMMARY**

Taxpayer's protest is sustained subject to Audit review of the documentation Taxpayer has provided. The Audit Division is requested to review Taxpayer's documentation and to the extent applicable make any appropriate adjustments to the proposed assessments based upon that documentation. Taxpayer's protest of the penalty and interest is denied.

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